United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

74-2328

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P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

Docket Nos.
74-2328 et al.

HARRY BERNSTEIN, et al.,

Defendants-Appellants.

PETITION FOR REHEARING AND, IN THE ALTERNATIVE, A RENEARING EN BANC.

FRANK G. RAICHLE
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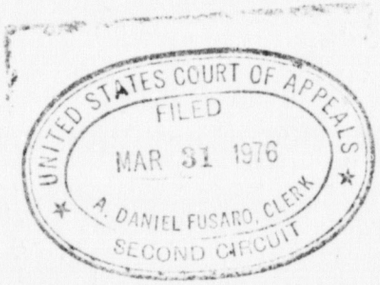

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UNITED STATES COURT OF APPEALS
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UNITED STATES OF AMERICA,

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HARRY BERNSTEIN, ROSE BERNSTEIN,
EASTERN SERVICE CORPORATION, FLORENCE
BEHAR and MELVIN CARDONA,

Defendants-Appellants.

PETITION FOR REHEARING AND, IN THE
ALTERNATIVE, A REHEARING EN BANC

TO THE HONORABLE JUDGES OF THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT:

The defendants-appellants, Harry Bernstein, Rose Bernstein and Eastern Service Corporation, present this their petition for rehearing and, in the alternative, a rehearing en banc* in the above-entitled case and in support thereof respectfully show:

This appeal is from convictions for "white collar" crimes in connection with the obtaining of Federal Housing Administration (FHA) guarantees of mortgage loans. The trial

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* Defendants'-appellants' time to make this application was extended by order until and including April 1, 1976.

before Judge Anthony J. Travia and a jury continued for approximately nine months and resulted in a 25,000 page transcript.

The appeal to this Court was argued on June 9, 1975 and decided on March 4, 1976. There are two opinions, the prevailing opinion by Judge Oakes and a dissenting opinion by Judge Van Graafeiland. Both opinions deal extensively with the facts pertinent to the appeal and since it is impossible within the limits of the length of this petition to deal with the facts, we must refer the Court to those opinions and to the briefs of the parties with respect to the facts.

The defendant Harry Bernstein was convicted of conspiracy, 16 counts of bribery and one count of submitting false statements to the FHA in connection with applications for mortgage insurance. Although he is 67 years of age, he was sentenced to five years imprisonment and fined a total of $175,000. His wife Rose Bernstein was convicted of conspiracy and four counts of bribery. She was sentenced to four years imprisonment and fined a total of $50,000. The defendant Eastern Service Corporation was convicted of conspiracy, 18 counts of bribery and 18 counts of submitting

false statements to the FHA and was fined $460,000. The aggregate of the fines where these petitioning defendants-appellants are concerned is $685,000.

Eastern Service Corporation, owned by the defendant Harry Bernstein, was an approved mortgagee of the FHA. It processed applications for mortgage loans on behalf of home owners who sought mortgage guarantees or mortgage insurance from the FHA and passed such applications along to the FHA for such mortgage guarantees.

The statements contained in the application were not those of Eastern Service or its management. They were the statements of the persons applying for the mortgage guarantees or insurance. The Government claimed that statements made in certain of the applications were false. There was no claim on the part of the Government that the defendant Harry Bernstein or Eastern Service Corporation had actual knowledge that the statements were false. In fact, the Government conceded that these defendants did not have actual knowledge but proceeded on a theory that these defendants had an obligation to insure the truth of the statement and worse than this that these defendants had a duty "to investigate" and to use "good credit judgment". The court then

equated lack of good credit judgment with a false statement.

Eight days after the decision in the case at bar and on March 12, 1976, the Sixth Circuit decided the case of United States v. Ekelman et al, a case involving alleged false statements made to the Veterans Administration and FHA, the original lender conducting business in the same way as did the defendant Eastern Service Corporation and performed the same function. The Sixth Circuit in an unanimous opinion held directly to the contrary of the holding of the majority in our case and stated in unmistakable terms that there was no duty to investigate and to insure the truth of statements passed along to the Veterans Administration or the FHA. Ekelman was a civil case at first relied upon by the Government in our case. Such reliance was withdrawn on the argument of the appeal herein and was the subject of a post argument exchange of supplementary letters to this Court. The Government relied upon the Ekelman case when the trial judge seemed to indicate an intention of holding that there was a duty to insure the truth of the statement, but such reliance was withdrawn when the trial judge indicated an intention to reverse himself. All this - before the case was decided by the Sixth Circuit.

As matters now stand, there exists an important unresolved conflict among the circuits as to the duty of an original lender circumstanced as was Eastern Service Corporation in our case. The Sixth Circuit states in Ekelman that "the law of this Circuit requires a showing of actual knowledge (of falsity) to establish liability under the FCA". The Court further stated that "this appears to be the preponderant view" citing cases. In our case, the majority held to the contrary. As we count, four appellate judges favor our contention and two go along with that of the Government.

We respectfully urge that in view of Ekelman, this Court should reconsider its decision, grant rehearing and harmonize circuit decisions on the important question unresolved.

I.

Without regard to Ekelman, we urge that the District Court erred in submitting the duty of the defendants as a question of fact to the jury and erred egregiously in equating a lack of proper credit judgment on the part of the defendants to a false statement.

With due respect we believe that Judge Van Graafeiland is correct and Judge Oakes is in error with respect to certain fundamentals of the District Court's charge. Judge Oakes finds certain of the claimed errors in the District Court's charge "troublesome". Judge Van Graafeiland states that he finds the solution of the question the "culmination of a series of errors in the district court's charge which fairly cry for reversal"* and, therefore, dissented.

Both opinions indicate in substance that the Government's case with respect to false statements involved proof of three elements: "(1) the making of a false statement in the FHA applications; (2) knowing it to be false; (3) made for the purpose of influencing the FHA to issue mortgage insurance." Both opinions cite United States v. Leach, 427 F. 2d 1107 (1st Cir.), cert. denied, 400 U.S. 829 (1970). Both opinions make it clear that the Government did not even contend that appellants Harry Bernstein, Florence Behar and Eastern Service Corporation had actual knowledge of the false statements at issue. What happened was that the District Court proceeded to instruct the jurors that it was for them to determine as a question of fact if the FHA placed an affirmative duty on these

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* Emphasis added.

defendants to insure that all of the statements in the mortgage insurance applications were true. Worse than this, the Court then proceeded to instruct the jurors further that they should determine whether Eastern Service Corporation had the duty to exercise "proper credit judgment" and equated any lack of proper credit judgment, without defining the term, to the making of a false statement.

Never before has this Court or any panel thereof in the many cases which have come before the Court ever upheld anything approaching this extreme. The strictures on the length of this petition make it impossible for us to here reargue at length our contentions. Accordingly, we ask that careful consideration be given to pp. 30-40 of our main brief and pp. 5-10 of our reply brief, and more importantly, the dissenting opinion of Judge Van Graafeiland.

We respectfully submit that if anything approaching a departure from established case law such as that which would follow from the prevailing opinion, it should be accomplished by the Court en banc with consideration of the other circuits' holdings and not by a slender majority of two to one of a panel of three.

Recurring briefly but importantly to Ekelman, we call attention to the certificate by the mortgagee (in our case Eastern Service, in the Ekelman case Franklin Mortgage Corporation). In the case at bar, the prevailing opinion states that this certificate gives rise to an "obligation and affirmant duty" to investigate and in substance constitutes an assurance that the statements are true. In the Ekelman case, the Sixth Circuit said

> "In certifying the truth of the information in the application 'to the best of its knowledge and belief' Franklin did no more than assert that it had no knowledge of, nor intention to make, misrepresentations."

We respectfully submit that with respect to the effect of statements made to the best of a deponent's "knowledge and belief", the Federal system should not have conflicts as to its meaning. Statements of all kinds and in many different contexts made to the best of one's knowledge and belief are made by the hundreds, probably thousands, everyday and any doubt as to the obligation assumed by the maker of such statement should be removed.

II.

Respectfully, and we hope not presumptuously, we believe that right on the basis of the prevailing and dissenting opinions seven or ten out of the total of 11 counts of bribery should have been reversed.

As we read these opinions, Judge Oakes agrees with our argument that although an FHA appraiser testified that he had an arrangement with the defendant Harry Bernstein whereby he was to get $50 for each top dollar appraisal he made for Mr. Bernstein, and that on one occasion he received $350 for seven such appraisals, the defendants were guilty of the payment of but one bribe and not seven bribes as the result of such payment. We argued, and Judge Oakes in his opinion states that he agrees with us, that it was the "corrupt gift" which is the essential criminal act of bribery and not the several criminal acts it was alleged were intended to be induced by the gift of payment. On this subject Judge Oakes' opinion reads in part as follows:

> "On four different occasions Bernstein paid Goodwin a lump sum for several property appraisals at $50 per appraisal, thus, for example, paying him $350 on October 6, 1967, for seven property appraisals. The problem is that while only one payment of money was made on this occasion, appellants were charged in five counts (and incidentally Bernstein fined $10,000 for each count and ESC $20,000 for each, note 1 supra). In totality four lump sum payments resulted in convictions on 11 counts. The question - one as to which there are no cases directly in point -

> "is whether each lump sum payment constituted one crime or several, a single transaction or many. Appellants argue, and the writer agrees, that under 18 U.S.C. § 201(b) it is the corrupt gift which is the essential criminal act on the part of the donor, though it be with the intent to induce several criminal acts (and might be punished severally under 18 U.S.C. § 201(c) on the part of the donee). (Citing cases.)"* Judge Oakes' opinion, p. 6675.

Judge Oakes' opinion states that his colleagues, or, as he puts it, the "majority", took a different view. Since Judge Van Graafeiland in his dissent would reverse all the counts, which of course would include the bribery counts but for different reasons, it would seem to us that with respect to at least seven or ten of the bribery counts the decision was two judges to one for reversal and dismissal of at least seven or ten of the bribery counts. Why then did not the Court reverse them? Stated another way, how then could the Court affirm conviction on 11 counts. It seems to us that our case is no different from the oft-recurring situation where one judge concurs in a result but not the reasoning of another judge leading to the same result.

The fact, as stated by Judge Oakes, that there are no decided cases directly in point, plus the fact that the

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* In our main brief we use the simple analogy that if one agreed to pay a policeman on the beat $10 a day to park in a restricted area and at the end of a five-day week handed him $50, such a person is not guilty of five briberies but only one.

question involved is important and more than likely to recur from time to time, suggests an additional reason for a rehearing and a rehearing en banc. For a further discussion, see our main brief, pp. 78-80.

While, as stated by Judge Oakes in his opinion, there are no decided cases directly in point, we call attention to a unanimous decision of the Court of Appeals of the State of New York in People v. Cox, 286 N.Y. 137*, where the New York Court of Appeals held that repeated thefts of nickels and dimes from the Independent Subway System of the City of New York, amounting to $25 or $30 each on separate occasions over a period of 11 months but more than $100 in the aggregate, constituted one crime (grand larceny). The Court said at 142:

> "Where the property is stolen from the same owner and from the same place by a series of acts, if each taking is the result of a separate, independent impulse, each is a separate crime; but if the successive takings are all pursuant to a single, sustained, criminal impulse and in execution of a general fraudulent scheme, they together constitute a single larceny, regardless of the time which may elapse between each act."

and further at 144:

> "When defendant, along with the various station agents, once agreed together to 'belt' the turnstiles, and thereafter carried out that purpose

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* Regrettably, this case had not come to our attention until we conducted additional research apropos of this application for rehearing.

> "by stealing the nickels, the acts necessary to constitute the offense of larceny were united and the resulting crime was single although there may have been a number of takings."

This is very close to our case since the government itself claims that all bribe payments were in accordance with a single conspiracy. The Cox case is clear authority for the proposition that there was only one bribe and not four (not a separate one for each of the four payments), let alone 11 bribes. All payments, if made, were in pursuance of a "single, sustained criminal impulse." There should be a reversal and a dismissal of ten, or at least seven, out of the 11 bribery counts.

As Judge Moore said in a different context in Fox v. United States, 417 F. 2d 84, 94 (2d Cir. 1969):

> "To cumulate penalties beyond the maximum authorized by § 7201 is, therefore, improper under these circumstances, and the $20,000 in additional fines assessed against each appellant on the §7206(1) counts must be vacated."

Judge Moore was speaking of a defendant who had made certain statements in tax returns but the principle of cumulating fines through a desired over-kill by the prosecution is certainly not proper.

See, also, Judge Hand's criticism of cumulative sentence in Nash et al. v. United States, 54 F. 2d 1006 (2d Cir. 1932); Amendola v. United States, 17 F. 2d 529

(2d Cir. 1927); Harrison v. United States, 7 F. 2d 259 (2d Cir. 1925), and Judge Medina's statement in United States v. Pagano, 224 F. 2d 682, 683 (2d Cir. 1955), where, in speaking of the counts in that case he said, "'the counts are merely variations of a single crime and transaction'; and these cumulative sentences have been imposed in the very teeth of our repeated admonitions."

WHEREFORE, upon the foregoing grounds and those which will appear to the Court upon the further consideration of the case, it is respectfully urged that this petition for a rehearing or a rehearing en banc be granted and that the judgment of the District Court upon further consideration be reversed.

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STATE OF NEW YORK)
: ss
COUNTY OF ERIE)

R. WILLIAM STEPHENS, being duly sworn, deposes and says that he resides at 19 Courtland Avenue, Town of Tonawanda, New York and is over the age of 21; that on the 30th day of March 1976 he mailed two copies of the within Petition for Rehearing and, in the Alternative, a Rehearing en Banc, in the above captioned case, in a sealed, postpaid wrapper, first class mail, in a Post Office box regularly maintained by the United States Government at 10 Lafayette Square, Buffalo, New York, to each of the following, directed as follows:

David E. Trager, Esq.
United States Attorney for the
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201
Attention: Ronald E. DePetris, Esq.

Henry J. Boitel, Esq.
233 Broadway
New York, New York 10007
Attorney for Appellant Florence Behar

John A. Kiser, Esq.
36 West 44th Street
New York, New York 10036
Attorney for Appellant Melvin Cardona

those being the addresses designated by them for that purpose in the preceding papers in this action.

R. William Stephens

R. William Stephens

Sworn to before me this

30th day of March 1976.

Helen B. Gerber

[illegible]
Notary Public, State of New York
Qualified in Kings County
My Comm. Expires March 30, 1977